Supreme Court, U. S.
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No. 74-521

In the Supreme Court of the United States

OCTOBER TERM, 1974

ROGERS C.B. MORTON, SECRETARY OF THE INTERIOR,
PETITIONER

v.

DELTA MINING, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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In our petition for certiorari we stated that if the Interior Department were to attempt to reassess the backlog of cases involving penalties assessed under the old procedures, it would severely hamper the Department's efforts to process current violations and assessments (Pet. 13-16). In their opposition to the petition, respondents Delta Mining and G.M.W. Coal Company challenge the accuracy of our estimate of the number of cases involved and suggest that the petition exaggerated the extent of the burden involved (Pet. Opp. 4-5).

The Assistant Attorney General for the Civil Division accordingly asked the Interior Department to review again the accuracy of the estimates contained in our petition and to comment upon the respondents' assertions concerning the feasibility of rapidly reassessing the penalties in the pending cases.

The Department's reply (App., *infra*) provides a more accurate estimate of the number of cases involved, based on an audit conducted subsequent to the filing of the petition. It also explains in some detail why the Department remains of the view that the reassessment of the penalties involved would be a very burdensome undertaking that would severely hamper current enforcement efforts.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JANUARY 1975.

APPENDIX

United States Department of the Interior
Office of the Solicitor
Washington, D.C. 20240
January 16, 1975

Honorable Carla A. Hills
Assistant Attorney General
Civil Division
U.S. Department of Justice
Washington, D.C. 20530

Dear Mrs. Hills:

You recently requested our views and comments upon respondent's reply brief filed before the Supreme Court in *Morton* v. *Delta Mining, Inc.*, No. 74-521. The portion of respondent's reply brief which you quoted is as disturbing to us as it is to you. The figures presented to you at the time of preparation of the petition for certiorari were provided by MESA's Office of Assessments and at the time given they were thought to be accurate by all concerned. However, subsequent to that time Departmental auditors in the course of an overall audit of Interior's assessment program noted that the most accurate figures available indicate about 2,350 cases involving 24,000 violations were referred to the Department of Justice for enforcement up until March of 1973. However, subsequent payments, settlements, and default judgments have reduced the number of cases outstanding to 2,050 involving 18,350 violations. This figure is subject to monthly change as reports of new settlements by U.S. Attorneys reach the Office of Assessments.

Respondent cavalierly suggests that MESA assessed a 36,000 violation backlog in thirteen months. This is intended to prove that reprocessing the 18,350 violations which

are before the U.S. courts, will be no real burden. That is a gross misstatement. In March of 1973 the Department was enjoined from using any part of the assessment procedures contained in 30 CFR Part 100 as it existed at that time. (An amended Part 100 has now been reinstated since August, 1974.) From March 1973 to October 1973, the Assessment Office struggled to assess violations currently being issued and to reassess about 36,000 violations which had been assessed under the prior system but which were in various stages of completion. Their efforts were not successful. They in fact fell further behind. In this emergency situation, the Administrator of MESA took personnel from the enforcement area to aid the assessment staff. Approximately 35 people were assigned to assessing the 36,000 violation backlog bringing the total work force to 74 assessors. The task required fourteen months in all. That the task was accomplished at all, is a tribute to their motivation and ability rather than an indication of how light a burden it was. It must be emphasized that people assigned to assessment work must have special training, skills and maturity. The people assigned were some of MESA's most qualified inspectors. Despite this, a training period of two months was necessary before these personnel were truly productive. Finally, the loan of these people could only be accomplished so long as the inspection corps was able to meet its statutory responsibilities of conducting a minimum of four health and safety inspections a year at each coal mine in the nation.

Today, the Assessment Office has a work force of 15 assessors and a backlog of 21,000 violations. In addition, it has a backlog of 5,000 conferences. To reprocess another 18,000 violations would be a tremendous setback to their efforts to achieve a current status. Moreover, additional people may well not be available to aid in this work.

As mentioned, the inspection force is required to conduct a minimum of four health and safety inspections per year in each coal mine. With the energy crisis, there has been a steady rise in new coal mines and the inspection force can ill afford to lose valuable manpower. In addition to this, these people have already begun this fiscal year's special programs which are designed to reduce fatalities. Any people who could be made available to work would need training. Finally, there would be the task of finding sufficient clerical support to process the additional work. With all these hurdles in mind, it is estimated that 300 man weeks would be needed to process these additional violations, should it be required. Moreover, the figure takes into account reprocessing new assessments and does not account for conference time. Conferences as mentioned already have quite a large inherited backlog. It is doubtful that the additional conferences generated could be handled simultaneously with the current conference backlogs. Finally, all of this may well be an exercise in futility in a large number of the cases where operators desire *de novo* court review and have deliberately exercised that option.

While Interior regrets that the earlier information was not the most accurate and with the understanding that present figures are still approximations, we believe that the preceding explanation clearly demonstrates that there would indeed be a massive administrative burden to reprocess these cases and that such a result would involve harmful cutbacks in our present enforcement program. That is not to say we could not do the job. Interior is committed to firm enforcement of the Act and this includes the vigorous use of its civil penalty authority. If the law requires these violations must be redone in order to be enforced, then we will have no alternative but to find the means to do it.

I trust this is some assistance to you with preparing any submission to the court you think appropriate. If you have any further questions or desire further assistance, please contact Mr. Robert W. Long, Associate Solicitor, Division of Mine Health and Safety; his telephone number is 235-1151.

Sincerely yours,
Kent Frizzell
Solicitor